

# Civil Service Department City of New Orleans

## POLICE LIEUTENANT PROMOTIONAL APPEALS

### DOCKET NUMBERS

#8593 ERIC GILLARD

#8617 ANDRE CARTER

#8633 RAYMOND BYRD

VERSUS

DEPARTMENT OF POLICE

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### I. INTRODUCTION:

The Civil Service Department received and processed the Police Lieutenant promotional appeals of three Police Sergeants ("Appellants") protesting the Police Superintendent's ("Appointing Authority") denial of their promotion pursuant to *Civil Service Commission Rule VI, Section 6.1*, which provides:

If any qualified candidate or employee, whose name appears on a verified appointment or promotional list, believes that his appointment, allocation or promotion has been improperly denied, he may protest the denial of such by presenting such forms or documents as the Director [of Personnel] may prescribe. The Director [of Personnel], or any person designated by him, may hold special hearings to determine the facts of such case and the Director [of Personnel] shall make his decision on the basis of the written statements, and forms presented by the employee and on the facts brought out in the hearing. The employee shall have the right to appeal to the Commission if dissatisfied with the action of the Director [of Personnel].

Pursuant to *Civil Service Rule VI, Section 6.1*, a special hearing was held on March 14, 2016, May 12, 2016 and on April 27, 2017 during which numerous witnesses were called and

documents introduced. Upon completion of the hearing, the parties were directed to submit post-hearing memoranda articulating their positions.

The Appellants contend that they were improperly denied promotion on the basis that the promotional process was not merit-based, competitive, objective, consistent or fair. They contend that the rankings on the civil service examination and length of service should have been considered. They further contend that Paragraph 303 of the Consent Decree did not authorize the NOPD to unilaterally set promotional policy; it required the NOPD to work with Civil Service to develop and implement a system. They also argue that the factors contained in the Consent Decree were not tested and they were not aware of how they were being assessed based on those factors.

The Appointing Authority contends that he complied with Civil Service Rules, the 2010 Consent Decree and the NOPD Policy 1004 which requires that the NOPD consider the eight factors in Paragraph 303 of the Consent Decree prior to recommending a candidate for promotion. In addition, the Appointing Authority contends that the Appellants failed to identify any improper denial of promotion that would suggest that the promotional selections were not merit-based. According to the Appointing Authority, the Appellants' arguments are primarily based upon the fact that the Police Superintendent selected candidates for promotion who scored lower than the appellants on the Police Lieutenant promotional examination.

The Civil Service Department has reviewed the hearing officer's report along with the employee appeal forms, the Civil Service Commission's Rules, the Louisiana State Constitution, hearing transcripts, hearing exhibits, and the attorney's post hearing briefs. Below is a report and final determination in this matter.

## **II. PROCEDURAL HISTORY AND FACTS:**

### **A. The Civil Service Department established a competitive, ranked eligible list for Police Lieutenant as a result of a valid examination in accordance with Civil Service Commission Rules, the Uniform Guidelines on Employee Selection Procedures and the Louisiana State Constitution:**

In observance of Civil Service Commission Rule VI, the Uniform Guidelines on Employee Selection Procedures and the Louisiana State Constitution, the Civil Service Department created a merit-based, competitive Police Lieutenant's examination based on a job analysis of the rank of Police Lieutenant.

According to the Civil Service Commission's Rules, "the purpose of Rule VI is to ensure the efficient screening and assessment of applicants for promotion and appointment under a general system based on merit, efficiency, fitness, and length of service as ascertained by examination which, so far as practical, shall be competitive."

Further, Article X Section 7 of the Louisiana State Constitution requires that, "Permanent appointments and promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive."

The Uniform Guidelines on Employee Selection Procedures ("the Uniform Guidelines") apply to federal, private, and public employers subject to Title VII of the Civil Rights Act of 1964. According to the Equal Employment Opportunity Commission ("EEOC") the purpose of the Uniform Guidelines is to "aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national

origin. Federal agencies have adopted the Uniform Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsibilities.<sup>1</sup> Employers who follow the Uniform Guidelines are more likely to provide a strong defense against claims of unlawful discrimination.

In order to create a valid examination for Police Lieutenant, a trained Psychometrician with over 30 years of experience in test development and validation performed a job analysis, which consisted of a series of surveys and interviews of subject matter experts ("SME"). At the request of the Civil Service Department, the Police Administration provided a pool of twenty-eight SME (8 Commanders and 20 Police Lieutenants), which represented a cross-section of the shifts and of the assignments of Lieutenants; were representative of the racial make-up of the classifications represented; and were dependable and well-trusted. In fact, Superintendent Harrison himself served as a subject matter expert for this examination prior to his appointment to Superintendent of Police.

The job analysis produced 14 areas of knowledge, skills and abilities ("KSA") that made up the job of Police Lieutenant. The examination content was then devised by the Psychometrician to measure those KSAs identified during the job analysis. The exam consisted of two parts: an In-basket exercise and a scenario-based job simulation. In advance of the exam, all candidates were provided with the KSAs to be measured in each section of the exam, their weights toward the final score, and a definition of each KSA. Candidate orientation

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<sup>1</sup> ([https://www.eeoc.gov/policy/docs/qanda\\_clarify\\_procedures.html](https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html))

sessions were required for all candidates prior to the examination. These orientation sessions provided information on what candidates could expect to see on the job simulation and a study guide.

Assessors were brought in from other police jurisdictions to score the job simulation using rating scales developed by the Psychometrician with SME input. Additionally, prior to making their ratings, the assessors received a handbook and on-site training on areas including the job analysis, KSAs and task list, techniques in behavioral observation, and how to avoid making common rating errors.

Following the administration and scoring of the exam, a competitive, ranked eligible list was established by Civil Service. The results of the exam indicated that 65 of the 81 candidates who took the exam passed and were ranked on the list. However, only 54 out of the 65 candidates met all of the educational requirements to be promoted, the 11 other candidates could be promoted upon submission of educational credentials. Candidates were provided with their individual exam results. They were also given an opportunity to attend an optional individual feedback session during which they received a breakdown of their performance on each of the KSAs measured by the exam.

**B. The Civil Service Department certified a competitive, ranked list of eligibles for Police Lieutenant in accordance with Civil Service Commission Rules:**

On January 29, 2015, the Civil Service Department provided a competitive, ranked list of eligible candidates (“the list”) to the Police Superintendent in accordance with Civil Service

Commission Rules. Certifications of the ranked list of eligibles were issued on 7/23/15, 10/5/15, 1/25/16, 5/6/16, 6/19/17 and 4/6/18.

In August of 2014, certain provisions of the Civil Service Commission Rules were amended as part of the “Great Place to Work” rules. Civil Service Commission Rule VI, 3.1 as amended under “Great Place Work” states:

Upon a request from the appointing authority to fill a position other than by demotion, transfer, or reinstatement, the Department shall provide to the appointing authority the names of all candidates certified by the Department to meet the minimum qualifications, to have passed the examination, if any, and met any selective certification requirements requested by the appointing authority and approved by the Personnel Director. The number of names to be certified shall not be less than three. The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

Civil Service Commission Rule VI, 3.5 (a.) also amended under the “Great Place to Work” rule changes states:

The eligibles certified shall be the highest ranking eligibles willing to accept employment, ranked in the following order:

1. All the eligibles on the appropriate preferred reemployment list, if any;
2. All other eligibles.

Prior to the “Great Place to Work” Rule amendments, Civil Service Commission Rule VI, 3.1 used a “Rule of Three”:

Upon a request from an appointing authority to fill a position other than by demotion, transfer, or reinstatement, the Director shall certify to the appointing authority the names of three eligibles for such position of the class of the vacant position, and if more than one vacancy is to be filled, the name of one additional eligible for each additional

vacancy. In cases of demotion, transfer or reinstatement, the Director shall approve or disapprove the name of the person submitted by the appointing authority.

The former “Rule of Three” rules mandated that a civil service position be filled by one of the three individuals with the highest scores on the examination. In practice, the “Rule of Three” was often combined with the use of banding. Bands (score groups) were established based on the psychometric properties of the exam score distribution or on job analysis information. All scores falling within a given band were considered tied (former Civil Service Commission Rule V, Section 5.1). This gave appointing authorities more discretion by increasing the number of candidates that could be considered for promotion.

Appointing authorities were always able to consider other factors in addition to exam score such as seniority, prior work experience, training, education, job performance, and discipline when determining or selecting who to promote from a Civil Service list of eligibles. However, the “Rule of Three” in combination with banding restricted the appointing authority to selecting from the top performers on the Civil Service examination before reaching down on the list of eligibles to select lower performers on the examination.

### **C. Impact of the “Great Place to Work Initiative”**

Currently, under the “Great Place to Work,”<sup>2</sup> the Civil Service Department is required to present a competitive list in order of examination score upon an appointing authority’s request. The Civil Service Department met that requirement by providing a competitive list, based on a thorough job analysis and examination process. However, the new “Great Place to Work” Civil Service Commission Rules do not provide guidance regarding the selection of candidates from

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<sup>2</sup> (New Civil Service Commission Rule VI, 3.5 (c), 2017)

the list. Thus, the only restrictions on the selection process would have to be gleaned from other provisions of the Civil Service Commission Rules and from the Louisiana Constitution.

In this case, in an effort to fill 18 vacancies, the Police Superintendent skipped over higher ranked candidates and reached down to the bottom of the list. For example, the Police Superintendent selected a candidate ranked number 62 out of 65 eligible candidates on the list. The Police Superintendent stated in his testimony that he did not rely solely on the competitive exam rankings to make selections for promotion. Superintendent Harrison referred to the eight factors contained in Paragraph 303 of the Consent Decree and, simultaneously, in the NOPD Policy 1004. (*Tr. 4/27/17 at 15:24-16:5*) Those eight factors are:

1. Effective use of community policing strategies;
2. Number of sustained and un-sustained complaints;
3. Number of circumstances of uses of force, including any found out of policy and use of force complaints;
4. Disciplinary history;
5. Problem-solving skills;
6. Interpersonal skills;
7. Education; and
8. Support for departmental integrity measures.

When asked if performance on the Civil Service test was considered a factor, Superintendent Harrison agreed that performance on the (Civil Service test) is known to the

committee but that it's not a criteria upon which people are judged. (Tr. 4/27/17 at 16: 19-25, 17:1-15.) In addition, the Superintendent treated the examination as a non-competitive examination where everyone who passed the examination was considered as eligible and the rankings did not have any value. In fact in his testimony, he stated that he requested the results in "pass and fail." He was "informed that it was a competitive exam and it had to be ranked but that he had specifically asked for it in pass or fail." (Tr. 4/27/17 at 20:3-12.)

### **III: The process utilized by the Police Department's Promotional Committee to select candidates from the certified Police Lieutenant list was not in accordance with the Uniform Guidelines on Employee Selection Procedures:**

As part of the promotional process, the New Orleans Police Superintendent established a promotional committee composed of no fewer than three Deputy Superintendents who were required to consider eight (8) factors when assessing an candidate's promotional eligibility as outlined in NOPD Policy 1004 on Promotions and Promotion Committee. The Chief of Staff, Daniel Cazenave, who coordinated the NOPD's promotion process for Lieutenants in the spring and early summer of 2015, provided testimony about the process. (Tr. 3/14/16 at 25:1-4.) He testified that Deputy Superintendents Rannie Mushatt, Jay Ginsberg, Stephanie Landry, Robert Bardy and Arlinda Westbrook participated in the promotional committees in May through July 2015. (Tr. 3/14/16 at 25:10-19.) Through his testimony Mr. Cazenave established how the process worked. For each candidate, he prepared and provided to the members of the promotion committee a copy of the NOPD Promotional Eligibility Form (NOPD Exhibit #6 - 3/14/16.) which was designed to show compliance with the eight (8) factors required by the

consent decree as outlined in NOPD Policy 1004. He also provided a copy of the Police Lieutenant Register – PIB Record Summary Matrix (NOPD Exhibit #11 – 4/27/17.) which summarizes the candidates disciplinary record including the number of DI-I complaints, whether the complaints were rank initiated or citizen initiated, sustained or not sustained, exonerated or unfounded and if there were any pending investigations. (*Tr. 3/14/16 at 45:22-25, 46:1-6.*) No candidate interviews or résumé reviews were conducted as part of NOPD's promotional process.

After considering the list of eight factors, the promotional committee's process, and reviewing testimony regarding the development and use of these factors, it does not appear that the selection process as described in NOPD's Policy on Promotions and the Promotion Committee was established in accordance with the Uniform Guidelines on Employment Selection Procedures. The Uniform Guidelines provide standards that "apply to tests and other selection procedures which are used as a basis for making employment decisions." (Section 1607.2 B.) These employment decisions may include decisions relative to hiring, promotion, demotion, training, transfers and retention. According to the Guidelines, "all employers are encouraged to use selection procedures which are valid, especially those employers operating under merit principles." (*Id. Section I, Q.6.*) Selection procedures, as defined by the Uniform Guidelines, "include the full range of assessment techniques, including written exams, performance tests, training programs, probationary periods, interviews, reviews of experience or education, work samples, and physical requirements." (*Id. Section I, Q.6.*)

There is no evidence to support that the Police Superintendent validated this selection process by conducting a job analysis to identify the necessary knowledge, skills or abilities

required for the position or promotion. While the Civil Service staff had conducted such a job analysis of the Police Lieutenant position, the Police Superintendent did not request that information, and the Civil Service staff was not asked to review the Police Superintendent's selection process prior to its implementation. In addition, there is no evidence to support that the Police Superintendent conducted a content validity study required to determine the validity of his selection process.

To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) measured in the selection procedure are a representative sample of the behavior(s) of the job in question. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be "operationally defined." Operational definitions provide a clear, unambiguous, detailed description of the characteristic or attribute being measured; ensure that assessors have the same understanding of the work-related behavior, knowledge, skill, or ability being measured; and establish a consistent rating system for all raters to follow. To prevent erroneous ratings or evaluations that often occur when those completing the ratings or evaluations have different views of what they are considering, the need for operational definitions is fundamental when collecting data, and thus is particularly important when a hiring or promotional decision is being made. In addition, to ensure consistency between multiple raters, the selection procedure should be scored under standardized conditions using a pre-determined scoring system that differentiates performance.

Below is a list of factors enumerated in NOPD Policy 1004 that the Deputy Superintendents were supposed to consider for promotional candidates during the evaluation

process. Because most of the factors lack operational definitions, it is difficult to determine what is being measured by each factor. The table below illustrates the factors that lacked operational definitions. This lack of a standard “ruler” often leads to ratings that are unreliable and lead to candidates being assessed inconsistently. That is, without a standard scoring system, two candidates with true differences may be erroneously considered as equal. Issues that should have been considered when creating the rating factors and associated scoring procedures, and the potential overlap between factors caused by the lack of operational definitions, are noted in the chart below for each factor.

| <b>NOPD Policy 1004<br/>(NOPD Exhibit #5)</b>     | <b>Issues to consider when creating operational definitions and/or<br/>standardized scoring system</b>   |
|---|--|
| 1. Effective use of community-policing strategies | How was “effective use of community-policing strategies” assessed per candidate? Number of Citizen Complaints? Citizen satisfaction survey? Number of Commendations?   |
| 2. Disciplinary history                           | What kind of discipline was included that was not already considered by the reviewing the candidates sustained or non-sustained complaints and use of force complaints? Was rating based on number of disciplinary actions, severity of actions, or both?  |
| 3. Problem-solving skills                         | How was this assessed? Was it assessed through the candidate’s work history? If so, how was this documented? While performance on the Police Lieutenant exam could have been an indicator, the results which indicated each candidate’s performance on some key competencies such as problem-solving were essentially ignored by the Deputy Chiefs when considering which candidates to promote. If the exam was used as pass or fail, what weight was given to this competency as compared to the others? |
| 4. Interpersonal skills                           | How was this assessed? Was it assessed through the applicant’s work history? Was it based upon the supervisor’s performance rating? Peer ratings? Interpersonal interactions with committee member? What weight was given to this competency as compared to the others?  |
| 5. Education                                      | What type of education was rated beyond that required by the minimum qualifications? Was additional credited education job related? Was specific education related to the job given more credit than non-related education? What weight was given to this competency as compared to the others?  |
| 6. Support for                                    | How is “support” defined, and how was it rated? Was rating based on  |

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|---------------------------------|---|
| departmental integrity measures | the candidates past behavior with NOPD? If so, how was this measured? What weight was given to this competency as compared to the others? |
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The following two factors listed below appear to have operational definitions and were used as the primary basis for screening candidates out of consideration for promotion.

| <b>NOPD Policy 1004 (NOPD Exhibit #5)</b>           | <b>Issues to consider when creating operational definitions and/or standardized scoring system</b>   |
|---|--|
| 1. Number of sustained and non-sustained complaints | NOPD Policy 1004 states the following: "Any open investigations of complaints of misconduct or sustained complaints of misconduct which has resulted in an assessed penalty greater than a Letter of Reprimand, shall be grounds for the denial of the promotion. For purposes of this paragraph, the period under review will be one year immediately preceding the requested promotion. The date used for the complaint incident will be the date the complaint was initiated, not the date of final disposition of the case." |
| 2. Use of Force                                     | Number and circumstances of uses of force, including any found to be out of policy and any use of force complaints.  |

Complicating matters further, the Police Superintendent, Chief of Staff and the Deputy Police Superintendents failed to articulate during testimony how each factor was assessed. For example, when asked about the criteria used by the Deputy Superintendents to make recommendations about who to promote, Superintendent Harrison responded that "my instructions to the Deputy Superintendents was to give me the best qualified candidates from the list." However, there is no indication in the policy about how the Deputy Superintendents were to judge which candidates were the "best" or how they arrived at the "recommended for promotion," "acceptable immediately," or "acceptable" ratings. The table below demonstrates

this assessment along with the number of candidates that fell in each category. (Tr. 5/12/16 at 41:13-25, 42:1-25.)

| Rankings for Promotion in order of relevance. | Description of Rankings   | Number of Candidates Ranked per Category(64) |
|---|---|--|
| Recommended for Promotion                     | Met all requirements and had unanimous votes from all members. (Total consensus)      | 23   |
| Acceptable Immediately                        | Met all requirements but did not receive votes from all members. (Majority consensus) | 9  |
| Acceptable                                    | Met all requirements and received at least two votes but not majority.                | 20   |
| Deferred                                      | Pending Investigation(s)  | 6  |
| Not Certified                                 | Not Certified as eligible by Civil Service  | 6  |

(Note: Number of candidates ranked per category based upon NOPD Exhibit #10 – April 27, 2018 hearing)

In addition, Deputy Superintendent Westbrook provided testimony that the eight factors were weighted equally (Tr. 5/12/16 at 34:1-2.) but the policy does not provide any standards regarding the weight awarded to each factor in the list. For example, problem-solving is on the list of factors to be considered but there is no indication how problem-solving is to be assessed and how it is to be used to rank candidates competitively for promotion purposes.

If all the factors were weighted equally, then it appears that the rankings were mostly dependent upon how strongly the Deputy Superintendents participating in the panel subjectively felt about each candidate. In fact, Deputy Superintendent Jay Ginsberg who participated on the May 2015 Police Lieutenant Promotional Committee testified that the “Deputy Chiefs who were trying to fill vacancies were to a large

degree relying upon their own experiences working with the individuals, their appreciation of their skills and if they didn't have any personal working relationship relying upon other people who had." Moreover, Mr. Ginsberg testified that he felt that Deputy Chief's opinion about a particular person who was going to fill their vacancy carried a lot of weight and that he felt that "there's horse trading that goes on in the police department and that's just the nature of how things work." (Tr. 5/12/16 at 111:7-25, 112:1-5.)

In addition, when asked to describe the promotional process for Police Lieutenants, Deputy Superintendent Rannie Mushatt who participated in both the May and July promotional committee meetings testified that "All the Deputy Chiefs met along with Mr. Cazenave. We looked over personnel records and disciplinary records. And we put together a list and made—first of all we eliminated people that had disciplinary issues and then we put a recommendation together for the Superintendent to choose from." (Tr. 5/12/16 at 122:10-17.) When asked, Deputy Superintendent Mushatt further testified that the ranking on the Civil Service list had no bearing on the Committee's decision to promote and that he could not recall considering factors such as problem solving skills, interpersonal skills, education, length of service or community policing skills. (Tr. 5/12/16 at 129:16-25, 130:1-17.) When asked what factor the group decided was the most important factor in determining who to promote, Deputy Superintendent Mushatt explained that experience was the most important factor. He stated that "I would think experience doing the particular job, most experience in a field, just most experience in general. (Tr. 5/12/16 at 128: 12-25.)

It appears that based upon the differences in testimony from the Deputy Superintendents that there was not a clear, transparent selection process. The Deputy Superintendents testified to differences in both how the process worked and the basis for their promotion decisions. This flies in the face of the Uniform Guidelines which require that raters have the same understanding of the work related behavior being measured and that there is a consistent rating system for all raters to follow.

#### **IV. Evaluation of Selection Rates:**

The Uniform Guidelines on Employee Selection state, "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact." The Uniform Guidelines further state, "The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part are satisfied."

The Civil Service Department recognizes that discrimination and disparate impact were not the focus of the hearing and that neither Party addressed allegations of discrimination during the course of the hearings. Nevertheless, it is the practice of the Civil Service Department to conduct a disparate impact analysis of promotional practices. We include the initial findings of such an analysis for informational purposes only and do not make any legal

conclusions. Omitting this information would have failed to reveal an additional area of concern and potential liability resulting from NOPD's promotional practices.

We include the statistical analysis in this report in order to adhere to the Commission's observation in *Achord et al. v. NOFD*, C.S. Nos. 8610 et seq. (5/24/2018) that such information may serve as a "cautionary tale" to appointing authorities seeking to supplement an appointment or promotion process with subjective measures.

## **V. ANALYSIS:**

### **A. Jurisdiction over Constitutional Claims**

The Civil Service Commission has exclusive jurisdiction over classified civil service employer-employee disputes that are employment related, including discrimination claims.<sup>3</sup> While the Commission cannot judge the constitutionality or equity of its own rules since that is a function of the courts; that restriction does not apply, when an employee complains that the implementation of a rule is discriminatory."<sup>4</sup> Accordingly, this would extend to other allegations regarding the constitutionality of the Civil Service Commission Rules for the City of New Orleans as applied.

In this case, the appeals are based upon employment decisions, and claims that the Civil Service Commission Rules were not fairly applied or merit-based. This would be in

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<sup>3</sup> *Akins v. Housing Authority of New Orleans*, 856 So.2d 1220 (La. App. 4 Cir. 9/10/03), 856 So.2d 1220, *writ denied*, 2003-2781 (La.12/19/03), 861 So.2d 574. *Flanagan v. Department of Environmental Quality*, 99-1332 at pp.4-6, 747 So.2d at 765-66.

<sup>4</sup> La. Const. Art. V sec 1; *Beauclaire v. Greenhouse* 05-75 (La. 2/22/06); 922 So. 2d 501; *Williams v. Civil Service Comm'n of City of New Orleans*, 613 So.2d 733, 735 (La. App 4 Cir 1993).

contravention of the Louisiana Constitution, which requires that, “[p]ermanent appointments and promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive.” Article X Section 7. Thus, Civil Service has the power to review whether the Civil Service Commission Rules are constitutional as applied.

The Louisiana Fourth Circuit Court of Appeal confirmed the jurisdiction of the Civil Service Commission in *Akins v. Housing Authority of New Orleans*, 856 So.2d 1220 (La.App. 4 Cir. 9/10/03), 856 So.2d 1220, *writ denied*, 2003-2781 (La.12/19/03), 861 So.2d 574, stating that:

It is well established in our jurisprudence that the Civil Service Commission has exclusive jurisdiction over classified civil service employer-employee disputes that are employment related. *La. Const. art. 10 sec. 10(A)(1)*. Article 10 provides as follows:

#### Section 10. (A) Rules (1) Powers.

Each commission is vested with broad and general rulemaking and subpoena powers for the administration and regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and other personnel matters and transactions; to adopt a uniform pay and classification plan; to require an appointing authority to institute an employee training and safety program; and generally to accomplish the objectives and purposes of the merit system of civil service as herein established. It may make recommendations with respect to employee training and safety.

Equally important, *La. Const. art. 10 sec. 10(B)*, titled *Investigations*, provides that “each commission may investigate violations of this Part and the rules, statutes, or ordinances

adopted pursuant hereto." Therefore, this special hearing is investigative in nature and for fact finding purposes, as well as to specifically address the arguments set forth by the Appellants and the counter-arguments made by the Appointing Authority.

## **B. Appellants' As-Applied Constitutional Claims**

Although the procedures of using a "Rule of Three" and "Banding" are no longer explicitly contained in the Civil Service Rules, the requirements of fairness, competitiveness, and merit remain enshrined in the Civil Service Commission Rules and it is, of course, an integral part of the Louisiana Constitutional provisions pertaining to Civil Service Rules.

The Louisiana Constitution requires that "promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive." (Art. X(7)) Moreover, the Civil Service Rules "embrace the merit system, and their intent is to preclude favoritism."<sup>5</sup> In this case, there is convincing evidence that the Superintendent's decisions were based on non-merit factors. Thus, the "Great Place to Work" Amendments that remove the procedural requirements of Banding and the Rule of Three are unconstitutional as applied.

In this case, the Superintendent selected candidates without regard to their ranked order, choosing for example a candidate ranked number 62 in scoring over candidate's ranked

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<sup>5</sup> *Sanders v. Department of Health & Human Resources*, 388 So.2d 768, 771 (La.1980).

number 3, 4 and 5 on the July 2015 eligibles' list. The record shows that the Superintendent was unable to articulate valid reasons for not using the list in the order of candidates. For example, the Superintendent testified that 8 factors were used to select candidates, but could not articulate during testimony as to how each factor was assessed. Moreover, the choices were seemingly random. There were 18 vacancies in July of 2015, so had the Superintendent picked 15 from the top 18 on the list and then reached down a bit for the additional candidates for well-articulated reasons that might suggest a more cohesive plan, and might show that the selections were merit-based. But by selecting candidates in a seemingly arbitrary manner, with no well-articulated or well-supported reasons for the selections, it appears that the selection was not based on merit but on other unknown factors. The "Great Place to Work" amendments, as applied, are unconstitutional, because in this case the Superintendent used unfettered discretion to select candidates. In doing so, the Superintendent chose to completely disregard the ranked list and the carefully considered selection process crafted by the Civil Service staff. The effect was to hire based on non-merit reasons, which is unconstitutional. As stated in Article X, Section 7 of the Louisiana Constitution, selections must be based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive."

### **C. Procedural Due Process**

The United States and Louisiana Constitutions guarantee due process. (U.S. CONST. amend. XIV; LA. CONST. ANN. art. X, § 8(A).) In the context of civil service employment, due process affords an employee a property right in continued comparable employment. (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).) In this

case, the affected applicants were on the list of ranked, eligible certified candidates for promotion, and were higher ranked than candidates who ultimately obtained the promotion. Accordingly, the affected applicants possessed property rights which cannot be taken away without cause and procedural due process.

Due process is a flexible standard and its procedural protections are factually driven and depend on the particular situation. (*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).) Under Due Process, an employee whose rights may be affected is entitled to notice and to be heard. (*Wilson v. City of New Orleans*, 479 So.2d 891, 894 (La.1985)) Correlatively, this right to notice and opportunity to be heard must be extended at a meaningful time and in a meaningful manner. (*Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972))

A review of the facts here show that (1) the Civil Service staff provided notice of promotional requirements after conducting a thorough job analysis; (2) after potential applicants were provided notice of the requirements, the Superintendent applied a policy based upon Consent Decree requirements (NOPD Policy 1004); and (3) the candidates did not have knowledge of how the factors in NOPD Policy 1004 would be applied. Thus the use of the NOPD Policy 1004 was a violation of due process.

#### **D. Civil Service Rule Violations**

By establishing NOPD Policy 1004, the Superintendent violated Civil Service Commission Rule VI, Section 2.1 by adding desirable qualifications for appointment to the position of Police Lieutenant beyond the minimum qualifications that had already been established for

application. In order to comply with Rule VI, 2.1, the Superintendent should have provided "desirable qualifications" to the Civil Service staff much earlier in the process, and obtained approval from the Civil Service staff prior to publicizing the vacancy. The procedure that must be followed is found within the section of Rule VI, 2.1 relative to submitting a requisition to fill a vacancy.

2.1 Whenever an appointing authority proposes to fill a vacancy in the classified service, the appointing authority shall submit to the Department a statement showing the position to be filled, the duties thereof, **the necessary and desirable qualifications** of the person to be appointed thereto, and the proposed class, if known. The Department shall approve or deny the position allocation within seven (7) days for existing classifications and fifteen (15) days for new classifications, exclusive of Commission approval. The Department shall announce each vacancy within thirty (30) days of an approved allocation. The Department shall not withhold reasonable approval of the request unless it can demonstrate that the request violates the principles of the merit system. For the purposes of allocating positions to a class, the Department shall interpret the existing classes broadly and in accordance with Rule III Section 2.1, including, when appropriate, waiving supervisory requirements and allowing a department to leverage classes used by other departments for efficiency. If the appointing authority and the Director disagree on the position's minimum qualifications or the class allocation and are unable to resolve their disagreement, the issue may

be brought before the Commission for a decision. (Amended August 25, 2014, effective September 1, 2014

Additionally, as mentioned earlier, the Civil Service staff believes that NOPD substituted its own selection criteria found in NOPD Policy 1004 for the Civil Service examination process used to establish the eligible list. NOPD's examination process was never reviewed or authorized by the Personnel Director as required by Civil Service Commission's Rule VI, Section 3.1:

The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

## **VI. CONCLUSION:**

While it is no longer mandatory for the Police Superintendent to select from a narrower band of three (3) candidates, the Superintendent is still obligated to use the list to inform his hiring and promotion decisions. The new "Great Place to Work" rules are not intended to give the Superintendent the power to create an additional scheme of requirements and qualifications, especially when this additional scheme was adopted in violation of Civil Service Rules. Moreover, the seemingly arbitrary manner in which the Superintendent selected candidates for promotion violates the Louisiana Constitution, which mandates a merit-based, competitive selection process, based on competitive examinations.

Keeping in mind the fairness and merit-based selection system enshrined in the Louisiana Constitution, and after reviewing the examination process, it seems clear that the level of success on the examination should be more than a starting point and that the Appointing Authority should give candidates' exam scores appropriate weight in the promotional decision-making process for Police Lieutenants. It is an objective measure of a candidate's knowledge, skills, and abilities. Furthermore, if all but a handful of candidates pass the examination, in this case 65 out of 81, the list should be followed absent compelling factors. To do otherwise, and to pick anywhere from the list would render the exam meaningless and detracts from the competitive nature of the examination process. A promotion is no longer merit based if the appointing authority can for all practical purposes pick anyone he wants from a competitive list.

This is particularly true when applied to the Police Department, which is a paramilitary department, functioning very differently from the other departments. It is a highly structured hierarchy, relying on a clear chain of command, and specialized skills. Transparency and competitiveness are of course important in all departments; however, in the case of the Police Department with a structured chain of command, the need for subordinates and supervisors to feel confident in that competitive selection process is even more important. For a person to follow the orders of superiors, they must feel confident in the selection process that forged the chain of command.

Although the Police Superintendent reasonably believed that the rule changes gave him as the appointing authority absolute discretion to select anyone from the list of 65, and to use

his own subjective and perhaps objective reasons to give one passing candidate preference over another, such a reading violates the Constitution and Civil Service Rules. The discretion provided under the “Great Place to Work” amendments must be read in light of the applicable Constitutional protections and the other Civil Service provisions. Using discretion when selecting candidates from a ranked list should be the exception, not the rule, at least as applied to paramilitary departments like a police department. When the ranked list is deviated from, a strong and credible reason should be given.

It would also be of benefit for the Police Superintendent to coordinate with the Civil Service Department during the job analysis, if he believes that other factors should be considered, or in developing an interview plan. This would also add to the sense of transparency and legitimacy to the process.

In this instance, the “Great Place to Work” amendments were unconstitutional as applied. By selecting applicants from anywhere on the ranked list, without adequate justification, the Superintendent ultimately made decisions based on non-merit factors, which violates the Louisiana Constitution and Civil Service Rules. These amendments should be read narrowly, requiring adherence to the ranked list absent strong and credible factors, and utilizing additional criteria only if consistently applied—such as a conducting interviews using a consistent interview plan, and applying the criteria in the Consent Decree in a fair and consistent manner after consultation with the Civil Service Department.

## **VII. REMEDY**

The Police Superintendent should have used a top down approach to select candidates based on exam scores, and should have provided a credible, merit-based reason as to why in a particular instance he disregarded the list and chose someone from lower down in the ranks.

Mr. Raymond Byrd was ranked number #3 on the Police Lieutenant's list and had over 21 years of service with the Police Department with no pending PIB investigations. The Police Department did not sufficiently present any information during the hearing to provide a basis for its decision to select 25 candidates, including selecting candidates 60, 61 and 62 who had less than 20 years of service for promotion, prior to Mr. Byrd's promotion on May 18, 2018. Therefore, Mr. Byrd is ordered retroactively promoted effective July 26, 2015.

| <b>Appeal</b> | <b>Name</b>  | <b>Ranking on Police Lieutenant List</b> | <b>Effective Date of Promotion to Lieutenant</b> | <b>Effective Date of Retroactive Order for promotion</b> |
|---------------|--------------|--|--|--|
| #8617         | Raymond Byrd | #3                                       | 5/18/16  | 7/26/15  |

Mr. Andre Carter was ranked number #11 on the Police Lieutenant's list and had over 24 years of service with the Police Department with no pending PIB investigations. The Police Department did not sufficiently present any information during the hearing to provide a basis for its decision to select 21 candidates, including selecting candidates 60, 61 and 62 who had less than 20 years of service for promotion, prior to Mr. Carter's promotion on May 18, 2016. Therefore, Mr. Carter is ordered retroactively promoted effective July 26, 2015.

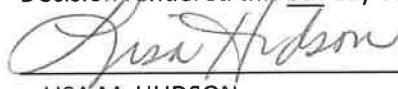
| <b>Appeal</b> | <b>Name</b>  | <b>Ranking on Police Lieutenant List</b> | <b>Effective Date of Promotion to Lieutenant</b> | <b>Effective Date of Retroactive Order for promotion</b> |
|---------------|--------------|--|--|--|
| #833          | Andre Carter | #11                                      | 5/18/16  | 7/26/2015  |

Mr. Eric Gillard was ranked number #4 on the Police Lieutenant's list and had over 22 years of service with the Police Department. The Police Department did submit information to demonstrate that Mr. Gillard had two pending PIB investigations which rendered him ineligible for promotion as of July 26, 2015. However, both investigations were disposed as of August 6, 2015 making Mr. Gillard eligible for promotion at that time. Our records indicate that the Police Department conducted several rounds of promotions on 10/5/2015, 1/25/2016, 5/8/2016, 8/14/16, 11/13/16, 5/14/16, and on 6/18/16, the date Mr. Gillard was promoted. There was not sufficient information provided as a basis for the Police Department selecting 21 candidates, including selecting candidates 60, 61 and 62 who had less than 20 years of service for promotion, prior to Mr. Gillard's promotion on June 18, 2016. Therefore, Mr. Gillard is ordered retroactively promoted effective October 5, 2015.

| <b>Appeal</b> | <b>Name</b>  | <b>Ranking on Police Lieutenant List</b> | <b>Effective Date of Promotion to Lieutenant</b> | <b>Effective Date of Retroactive Order for promotion</b> |
|---------------|--------------|--|--|--|
| #8693         | Eric Gillard | #4                                       | 6/18/16  | 10/5/15  |

In the event the retroactive promotions are not possible, it is ordered that these employees are paid the difference in salary based upon the effective date they should have been promoted until their actual promotions in order to remediate their respective losses.

Decision rendered this 8th day of November, 2018.



LISA M. HUDSON  
PERSONNEL DIRECTOR

11/8/18  
DATE

## Attachment 1

As noted in the Hearing Examiner's report, the Police Superintendent selected 18 candidates out of the 56<sup>6</sup> candidates eligible for promotion in July 2015, 4 candidates in October 2015, 5 candidates in January 2016, 4 candidates in May 2016, 3 candidates in August 2016, 3 candidates in November 2014, 2 candidates in May 2017, 3 in June 2017 and 2 in April 2018. The Police Superintendent testified that these 44 candidates were selected for appointment based upon the procedures contained within promotional NOPD Policy 1004. In keeping with the Uniform Guidelines, the Civil Service Department conducted an adverse impact analysis on these selection results.

The following is a racial breakdown of the total group of candidates who passed the examination:

| Totals for Race  | Number of candidates | Percent of total |
|------------------|----------------------|------------------|
| White            | 15                   | 26%              |
| African American | 39                   | 70%              |
| Hispanic         | 2                    | 4%               |
| <b>Total</b>     | <b>56</b>            | <b>100%</b>      |

The following table provides the percentages for those candidates actually selected (promoted):

| Totals for Race  | Number of candidates | Percent of total |
|------------------|----------------------|------------------|
| White            | 10                   | 23%              |
| African American | 33                   | 75%              |
| Hispanic         | 1                    | 2%               |
| <b>Total</b>     | <b>44</b>            | <b>100%</b>      |

<sup>6</sup> As mentioned earlier there were initially 54 candidates but it became 56 after 2 additional candidates were available for promotion in July of 2018 after submission of educational requirements.

**Selection Rate for Whites = 10/15= 67%**

**Selection Rate for African Americans = 33/39 = 85%**

Adverse impact is described by the Uniform Guidelines as “a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” In this case, African Americans were hired at a greater rate than whites, 85% of African Americans were hired vs. 66.7% of Whites. The selection rate for Whites, the non-protected group, is 79% (.67/.85) that of African Americans, the protected group. While the difference may represent a potential violation of the 4/5ths rule of thumb (.79 vs. .80), the difference is negligible. There were only 2 Hispanics on the list; one was hired and one was not.

The selection rate for females is 1.36% (.100/.73) that of males. The difference may represent a potential violation of the 4/5ths rule of thumb (.73 vs .80). This result indicates that gender may have been a factor as all of the eligible female candidates were promoted regardless of their placement on the list.

| Females Promoted to Police Lieutenant |                             |
|---------------------------------------|-----------------------------|
| Rank                                  | Effective date of Promotion |
| 2                                     | 7/26/2015                   |
| 6                                     | 7/26/2015                   |
| 21                                    | 7/26/2015                   |
| 34                                    | 7/26/2015                   |
| 36                                    | 7/26/2015                   |
| 38                                    | 7/26/2015                   |
| 42                                    | 10/5/2015                   |
| 13                                    | 1/25/2016                   |
| 49                                    | 1/27/2016                   |
| 64                                    | 11/13/2016                  |
| 43                                    | 6/18/2017                   |

The following is a gender breakdown of the total group of candidates who passed the examination:

| Totals for Gender | Number of candidates | Percent of total |
|-------------------|----------------------|------------------|
| Male              | 45                   | 80%              |
| Female            | 11                   | 20%              |
| <b>Total</b>      | <b>56</b>            | <b>100%</b>      |

The following table provides the percentages for those candidates actually selected (promoted):

| Totals for Gender | Number of candidates | Percent of total |
|-------------------|----------------------|------------------|
| Male              | 33                   | 75%              |
| Female            | 11                   | 25%              |
| <b>Total</b>      | <b>44</b>            | <b>100%</b>      |

**Selection Rate for Males = 33/45= 73%**

**Selection Rate for Females = 11/11 = 100%**

It appears that both race and gender information was known to the Promotional Committee when they were determining who to promote. This information was provided on the Lieutenant Promotional Register – PIB Record Summary form which was provided to the Deputy Chiefs during the panel evaluation of candidates. (See NOPD Exhibit #10 and #11 – April 27<sup>th</sup> hearing.)